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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CALIFORNIA EDUCATION COMMITTEE, LLC and PRISCILLA SCHREIBER,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California; EDMUND G. BROWN, JR., in his official capacity as Attorney General of the State of California; JACK O'CONNELL in his official capacity as California Superintendent of Public Instruction; and DOES 1 through 20 inclusive,

Defendants.

07 CV 2246 BTM (WMC)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COMPLAINT BY THE STATE DEFENDANTS

[Fed. R. Civ. P. Rules 12(b)(1), (6)]

Hearing Date: February 15, 2008
Time: 11:00 a.m.
Courtroom: 15
Judge: The Honorable Barry Ted Moskowitz

[Oral Argument Not Required]

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Defendants Arnold Schwarzenegger, in his official capacity as Governor of the State of California, Edmund G. Brown Jr., in his official capacity as Attorney General of the State of California, and Jack O'Connell, in his official capacity as the California State Superintendent of Public Instruction (collectively "State Defendants") respectfully submit the following Memorandum of Points and Authorities in Support of the Motion to Dismiss.

I.

INTRODUCTION

Plaintiffs California Education Committee, LLC and Priscilla Schreiber (collectively "CEC") bring this action facially challenging on both federal and state constitutional grounds various provisions of the California Education and Penal Codes. The challenged Penal Code sections generally pertain to the State's "hate crimes" law, while the challenged Education Code sections generally pertain to prohibited discrimination in California schools, including on the basis of "gender" and "sexual orientation." CEC brings this pre-enforcement challenge to these sections where no immediate threat, or past history, of prosecution under the challenged statutes against CEC exists. The majority of CEC's factual assertions and legal claims are based on an incorrect interpretation of both existing law and a recent statute signed into law by the Governor. The law the Governor signed amended certain provisions of the Education Code, but did not amend the Penal Code.

Specifically, CEC argues that California Education Code §§ 210.7, 212.6, 220, 51500, and California Penal Code §§ 422.55(a)(2) and (6), 422.55(b), 422.56(c), and 422.6(a)[1/] "are void for vagueness because their prohibitions are not clearly defined." (Complaint for Declaratory and Injunctive Relief and Nominal Damages, ¶¶ 29-30 ("Complaint") (citing U.S. Const. amends. I, XIV).) CEC further argues that these code sections violate the California Constitution because they "are in contravention to the rights of safety and privacy and amount to serious invasion of those interests." (Compl. ¶ 36 (citing Cal. Const. art. I., § 1).) CEC requests declaratory and

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1. The Complaint's First Cause of Action incorrectly cites the challenged Penal Code provisions as "§§ 420.6(a), 420.55(a)(2) and (6), 420.55(b), and 420.56(c) . . . ." However, it is apparent from the body of the Complaint the actual Penal Code provisions that are challenged.

injunctive relief barring enforcement of these Code sections and further requests nominal damages.

The Motion to Dismiss should be granted for four reasons:

1. The Complaint presents no Article III "case or controversy" that is ripe under both constitutional and prudential components;

2. The Complaint fails to state a claim against the Governor, the Attorney General, and, in part, the Superintendent of Education because of Eleventh Amendment immunity;

3. The Second Cause of Action predicated on state law is barred under the Eleventh Amendment and *Penhurst St. Sch. & Hosp. v Halderman*, 465 U.S. 89 (1984); and,

4. The Court under 28 U.S.C. § 1367(c) should decline to exercise supplemental jurisdiction over the Second Cause of Action because the challenge presents a novel issue of state law.

II.

FACTUAL AND STATUTORY BACKGROUND

CEC brings a facial challenge to numerous sections of the California Penal and Education Codes. On October 12, 2007, the Governor signed into law Senate Bill 777 ("SB 777") that amended certain sections of the Education Code.[2/] Cal. Sen. Bill No. 777 (2007-2008 Reg. Sess. (Request for Judicial Notice in Support of Motion to Dismiss ("RJN") at ex. C).) To

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2. SB 777 took effect on January 1, 2008. (RJN at ex. C, p. 3, §§ 3-4.) CEC mistakenly states that the law will take effect on January 11, 2008. (Compl. ¶ 1.) A referendum on SB 777 is currently in circulation with proponents of the referendum gathering signatures from eligible voters. (RJN at Ex. A.) The Attorney General has prepared a title and summary of the referendum on SB 777 for the voters. (*Id.* at Ex. B.) Presumably, CEC states January 11, 2008 is the effective date of SB 777 because proponents of the initiative have until January 10, 2008 to file the petition with required signatures with county elections officials. (*Id.*)

If the proponents of the measure gather the required 433,971 qualified signatures, election officials where the referendum is circulated "shall determine the number of qualified voters who have signed the petition." Cal. Elec. Code, § 9030(d). The law the referendum seeks to repeal, in this case SB 777, is then stayed from taking effect until either the qualification attempt fails or the referendum is voted on by the electorate. Cal. Const., art. II, § 9(b). Thus, it is possible that to the extent that CEC's claims are based on the changes to the Education Code made by SB 777, this challenge will be mooted if the referendum qualifies for the next statewide election.

place in context CEC's facial challenge, each individual Education and Penal Code section must be separately analyzed because many were in existence and not amended in any way by SB 777. The substantive changes in the law are restricted to the State's Education Code. *Crucial to evaluating the challenges in this case is the fact that SB 777 did not amend any provision of the Penal Code.*

A. California Penal Code Prohibiting "Hate Crimes"

California law punishes as a "hate crime" any criminal act committed "in whole or in part, because of one or more of the following actual or perceived characteristics of the victim . . . ." Cal. Penal Code, § 422.55(a). The law specifies that for purposes of the hate crimes law the protected characteristics are:

(1) Disability.

(2) Gender.

(3) Nationality.

(4) Race or ethnicity.

(5) Religion.

(6) Sexual orientation.

(7) Association with a person or group with one or more of these actual or perceived characteristics.

Cal. Penal Code, § 422.55(a)(1-7). "Gender" in the Penal Code is defined as "sex, and includes a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth." *Id.* at § 422.56(c). "Sexual Orientation" is defined as "heterosexuality, homosexuality, or bisexuality." *Id.* at (h).

The Penal Code also prohibits "*conduct* consisting of willful interference with another person in his or her exercise of constitutional or statutory rights by means of force or threat of force, the conduct being undertaken because of the actor's bias." *In re M.S.*, 10 Cal.4th 698, 722 (Cal.1995) (citing Cal. Penal Code, § 422.6) (emphasis in original).) Specifically, the law provides that:

/ / /

> No person . . . shall by force or threat of force, willfully intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege . . . in whole or in part because of one or more of the actual or perceived characteristics of the victim listed in subdivision (a) of [Penal Code] Section 422.55

Cal Penal Code, § 422.6(a). A "hate crime" includes a violation of § 422.6. Cal Penal Code, § 422.55(b).

B. California Education Code Prohibiting Discrimination In Schools

The California Education Code currently prohibits discrimination on the basis of a protected characteristic "in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid." Cal. Ed. Code, § 220. Specifically, as unamended by SB 777, the law provides that:

> No person shall be subjected to discrimination on the basis of sex, ethnic group identification, race, national origin, religion, color, mental or physical disability, or any actual or perceived characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code . . . .

Id. "Sex" is defined in the Education Code as "the biological condition or quality of being a male or female human being." *Id.* at § 212. Furthermore, "sex" carries the identical definition in the California Code of Regulations promulgated under the Education Code. Cal. Admin Code, tit. 5, § 4910(v). Since 2005, "Gender" has been defined in the Code of Regulations as it is in the Penal Code, which is "sex, and includes a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth." *Id.* at subd. (k). Finally, "Sexual orientation" is defined by the Penal Code as "heterosexuality, homosexuality, or bisexuality," and the Code of Regulations as "actual or perceived heterosexuality, homosexuality, or bisexuality." Cal Penal Code, § 422.56(h); Cal. Admin Code, tit. 5, § 4910(w).

1. Non-Substantive Amendments of Education Code by SB 777

SB 777 amends several sections of the Education Code; however, many of the amendments did not substantively change the law. First, SB 777 revises Education Code § 220 to reflect the same protected characteristics codified in the State's hate crimes law. *See* Cal.

Penal Code, § 422.55. Revised Education Code § 220 provides that:

> No person shall be subjected to discrimination on the basis of disability, gender, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid.

(RJN, ex. C, at p. 4.) These revisions in the express language of Education Code § 220 to add "sexual orientation" and "gender" do not substantively change the law because existing Education Code § 220 already cross-references the State's hate crimes law, which includes "sexual orientation" and "gender." Cal. Penal Code, § 422.55(a) (2) & (6). SB 777, in other words, merely amends Education Code § 220 to add explicitly what was already incorporated by reference.

SB 777 also adds § 210.7 to the Education Code defining the word "gender." The definition of "Gender" under SB 777 is identical to the definition that already exists under both the State's Penal Code and the State's Code of Regulations. Cal. Penal Code, § 422.56(c); Cal. Admin Code, tit. 5, § 4910(k). Again, SB 777 merely explicitly adds the definition of the word "gender" to the Education Code that was already in effect under both the Penal Code and California Code of Regulations.

Finally, SB 777 also adds § 212.6 to the Education Code. Section 212.6 provides that "'Sexual orientation' means heterosexuality, homosexuality, or bisexuality." (RJN, ex. C, at p. 4.) As previously stated, "sexual orientation" is already defined by the Penal Code as "heterosexuality, homosexuality, or bisexuality," and by the State's Code of Regulations as "actual or perceived heterosexuality, homosexuality, or bisexuality." Cal. Penal Code, § 422.56(h); Cal. Admin Code, tit. 5, § 4910(w). This addition merely clarifies that the Education Code defines "sexual orientation" the same way as other statutory provisions.

2. Substantive Amendments of Education Code by SB 777

SB 777 does make several substantive changes to the Education Code. First, SB 777 repeals Education Code § 212. As noted above, "sex" is currently defined by Education Code § 212 and the California Code of Regulations as "the biological condition or quality of being a male or female human being" Cal. Ed. Code, § 212; Cal. Admin Code, tit. 5, § 4910(v). SB 777 does not provide a new definition of "Sex."

SB 777 also makes a substantive change to Education Code § 51500. Existing law provides that "[n]o teacher shall give instruction nor shall a school district sponsor any activity which reflects adversely upon persons because of their race, sex, color, creed, handicap, national origin, or ancestry." Cal. Ed. Code, § 51500. First, SB 777 revises Education Code section 51500 to read:

> No teacher shall give instruction nor shall a school district sponsor any activity that promotes a discriminatory bias because of a characteristic listed in [Education Code] Section 220.

(RJN, ex. C, at p. 24.)[3/] Second, SB 777 expands the list of groups covered by this section beyond "race, sex, color, creed, handicap, national origin, or ancestry." By incorporating Education Code section 220, SB 777 adds "sexual orientation," "gender" and "association with a person or group of persons with one or more actual or perceived [protected characteristics]" to the existing list of protected characteristics.

III.

ALLEGATIONS OF THE COMPLAINT

A. Facts Alleged in the Complaint

According to the Complaint, CEC is "an association of persons directly involved in the California public education environment, inclusive of school board members, teachers, school counselors, parents and students." (Compl. ¶ 8.) The Complaint alleges that each member of CEC, with the exception of a student member, "is responsible for the implementation and

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3. It is questionable whether the specific changes to Education Code § 51500 substantively alter the law at all because the more general prohibition on discrimination contained in Education Code § 220 was not substantively altered whatsoever by SB 777. In other words, it is difficult to conceive of a set of facts where, for example, there is a school sponsored activity that "promotes a discriminatory bias" against a student because of their sexual orientation and thereby violates § 51500, but does not at the same time violate § 220 because the student is not "subjected to discrimination on the basis of . . . sexual orientation . . . ." The difficulty in analyzing this hypothetical scenario highlights the essential flaw with CEC's approach to filing this action in federal court without the benefit of a state court interpretation of the challenged laws.

enforcement of laws applicable to public schools and will be responsible . . . to apply and enforce Senate Bill 777 and California's definition of 'gender.'" (Compl. ¶ 8(a-d).) The student member "Jennifer N., by and through her parents Roger and Julie N., is a California public high school student in San Diego County who is involved in extracurricular athletics at her high school and regularly uses the girls' restroom and girls' locker room facilities provided at her school." (*Id.* at ¶ 8(e).)

B. Causes of Action and Prayer for Relief

The Complaint has two causes of action. The First Cause of Action alleges that California Education Code §§ 210.7, 212.6, 220, 51500, and California Penal Code §§ 422.55(a)(2) and (6), 422.55(b), 422.56(c), and 422.6(a) "are void for vagueness because their prohibitions are not clearly defined." (Compl. ¶¶ 29-30. (citing U.S. Const. amends. I, XIV).) The Second Cause of Action alleges that these code sections violate the California Constitution because they "are in contravention to the rights of safety and privacy and amount to serious invasion of those interests." (*Id.* at ¶ 36. (citing Cal. Const. art. I, § 1).)

The Complaint prays for "Preliminary and Permanent Injunctions enjoining Defendants, Defendants' agents and employees, and all persons in active concert or participation with them from enforcing the laws set forth in the first cause of action." (Compl. p. 10, ln. 21-23.) The Complaint also prays for a Declaratory Judgment that the above-mentioned laws violate the First and Fourteenth Amendments to the U.S. Constitution and article 1, Section 1 of the California Constitution. The Complaint also prays for "reasonable costs and expenses of this action, including attorney's fees, in accordance with 42 U.S.C. § 1988." (*Id.* at p.11, ln. 6-7.) The Complaint does not include a prayer for nominal damages, though the Complaint is styled as such in the caption.

IV.

LEGAL ARGUMENT

A. Legal Standards Applicable to Rule 12(b) Motion

The State Defendants move to dismiss the Complaint under Federal Rules of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, and 12(b)(6) for failure to state a claim upon which relief can be granted.

1. Rule 12(b)(1)

Rule 12(b)(1) allows a party to raise the defense that the court lacks "jurisdiction over the subject matter" of a claim. "A motion to dismiss for lack of subject matter jurisdiction may either attack the allegations of the complaint or may be made as a 'speaking motion' attacking the existence of subject matter jurisdiction in fact." *Thornhill Publ'g Co. v. Gen. Tel. & Elecs.*, 594 F.2d 730, 733 (9th Cir. 1979) (citations omitted). The instant Rule 12(b)(1) motion attacks the allegations of the complaint. In such an instance, and similar to the standards applicable to Rule 12(b)(6) motions, the district court must accept the allegations of the complaint as true. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 1994); Schwarzer, Tashima & Wagstaffe, *Rutter Group Practice Guide: Fed. Civil Procedure Before Trial,* § 9:84 (The Rutter Group 2007).

Where a Rule 12(b)(1) motion is brought, the burden of proof is on the party asserting federal subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1944); *Thornhill Publ'g Co.,* 594 F.2d at 733.

2. Rule 12(b)(6)

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the complaint. *N. Star Int'l v. Arizona Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). Dismissal of the complaint or of any claim within it "can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990) (citing *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir. 1984)).

In considering a motion to dismiss for failure to state a claim, the court accepts as true all material allegations in the complaint and the reasonable inferences that can be drawn from them. *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984); *Love v. United States,* 915 F.2d 1242, 1245 (9th Cir. 1989). However, the court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations. *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). A court generally cannot consider materials outside of the complaint, except for materials submitted as part of the complaint or the contents of which are alleged in the complaint. *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). The court may also consider matters subject to judicial notice. *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988).

B. The Complaint Must Be Dismissed Because No Ripe Article III "Case or Controversy is Presented

To invoke this Court's jurisdiction, CEC must present a justiciable Article III "case or controversy" that is ripe. *See Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 848 (9th Cir. 2007) (citing *Allen v. Wright*, 468 U.S. 737, 750-51 (1984)). Ripeness is "peculiarly a question of timing." *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 140 (1974); *American-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501, 510 (9th Cir. 1991). The Supreme Court has stated the "ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 56 n.17 (1993). The doctrine is intended to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). To establish ripeness, the court must be satisfied that both the prudential and constitutional components have been satisfied. *Alaska Right to Life*, 504 F.3d at 849 (citing *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 808 (2003)).

1. This Action Fails to Satisfy the Constitutional Component of Ripeness

The constitutional component of "ripeness can be characterized as standing on a timeline." *Thomas v. Anchorage Equal Rights Comm.*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc). The Ninth Circuit has instructed that "in many cases, ripeness coincides squarely with standing's injury in fact prong." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)) (identifying the "irreducible constitutional minimum of standing" as (1) injury in fact; (2) causation; and, (3) redressability).) This Circuit has "held that neither the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the "case or controversy" requirement." *Thomas*, 220 F.3d at 1139. To satisfy the "case or controversy" requirement, "there must be a 'genuine threat of imminent prosecution.'" *Id.* (citing references omitted).

The evaluation of the "genuineness of a claimed threat of prosecution" is a three-part test. *Id.* The court must examine: (1) "whether the plaintiffs have articulated a 'concrete plan' to violate the law in question," (2) "whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings," and, (3) "the history of past prosecution or enforcement under the challenged statute." *Id.*

Examining the first factor, CEC's Complaint contains assertions of the "impossible position" SB 777 allegedly places educators in, but contains few facts showing any "concrete plan" to violate the eight separate California statutes challenged. For example, CEC asserts that SB 777 "requires educators to have foreknowledge of the private mental impressions, thoughts, and disabilities of each person with whom the educational institution comes into contact," (Compl. ¶ 20), that "[e]ducators are also in the vulnerable position of being in violation of the California Penal Code should they fail to guess properly at an individual's self-defined sex," (Compl. ¶ 23) and that "educators and administrators will be in criminal violation of the Penal Code if they physically or forcefully interfere with, or threaten to interfere with, any student or employee seeking access to facilities traditionally reserved to the opposite sex, whether by intimidation, oppression, or threat of suspension." (Compl. ¶ 26.) None of these allegations amount to the "concrete plan" required under the law. For CEC to satisfy this prong, "the Constitution requires something more than a hypothetical intent to violate the law." *Thomas*, 220 F.3d at 1139.

CEC's assertions flow from an incorrect understanding of SB 777. It bears repeating that SB 777 does not add a new definition of either "Gender" or "Sexual Orientation" to the Education Code. Since 2005 both the California Code of Regulations and the Penal Code have defined the word "Gender." Cal. Penal Code, § 422.56, subd (c); Cal. Admin Code, tit. 5, § 4910, subd. (k). SB 777 merely explicitly defines "Gender" in the Education Code by adding § 210.7.

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Similarly, the addition of "Sexual Orientation" at § 212.6 to the Education Code does not substantively alter the law because "Sexual orientation" was and is already defined by the Penal Code as "heterosexuality, homosexuality, or bisexuality," and the State's Code of Regulations as "actual or perceived heterosexuality, homosexuality, or bisexuality." Cal. Penal Code, § 422.56, subd. (h); Cal. Admin Code, tit. 5, § 4910, subd. (w). All this is to say that CEC has been operating under the same legal regime with regard to the Penal and Education Codes since at least 2005 regarding discrimination on the basis of "Gender" and "Sexual Orientation." Despite the lapse of two years, CEC's Complaint simply fails to identify a "concrete plan" to violate any of the eight separate statutes challenged in the Complaint.

Turning to the second factor, CEC does not allege that any authority, much less any prosecuting authority, has communicated a specific warning or threat to initiate proceedings. CEC may argue that it does not know if it faces prosecution or not because the interpretation of the challenged statutes has not been ruled on by the state courts. First, to the extent that CEC argues that SB 777 "redefines" the terms "gender" and "sexual orientation," that is simply not the case. Moreover, any claimed confusion or uncertainty regarding state law militates in favor of dismissing the instant action in its entirety so that CEC may first ask the state courts for an interpretation of state law, *see infra* Part IV. E, and consider CEC's federal and state law claims. *See Asarco, Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (declaring that "state courts . . . possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law.").

Finally, the third factor does not favor CEC. Utterly missing from the Complaint is any allegation that CEC has faced a "history of past prosecution or enforcement" under any of the eight statutes challenged. As noted above, SB 777 made few substantive legal changes to the Education Code and absolutely none to the Penal Code. Given these facts, CEC has failed to satisfy the constitutional components of ripeness.

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2. This Action Fails to Satisfy the Prudential Component of Ripeness

Even if the constitutional component of ripeness is satisfied, a court must still evaluate the prudential component. *Thomas*, 220 F.3d at 1141. The "prudential considerations of ripeness are amplified where constitutional issues are concerned." *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 662 (9th Cir. 2002) (citing *United Public Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 90-91 (1947)). This allows courts to avoid deciding "constitutional questions in a vacuum." *American-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501, 511 (9th Cir. 1991) (stating "[e]ven in the case of a pre-enforcement challenge such as this, the exercise of jurisdiction without proper factual development is inappropriate."). The two factors under the prudential component are "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* (citing *Abbot Laboratories v. Gardner*, 387 U.S. 136, 148 (1967)).

Examining the first prong, this case is not fit for a judicial decision. The Complaint fails to identify any instance where a CEC member has been pursued civilly, criminally, or by any other legal process for allegedly violating any of the eight challenged sections of the Education or Penal Codes. CEC is essentially seeking an advisory opinion from this Court. Accordingly, the scant facts alleged in the Complaint leave this case unfit for the Court's review.

Turning to the second prong, CEC will face no hardship in withholding court consideration. If this lawsuit is dismissed, CEC may simply re-file their action in state court raising both their federal and state constitutional claims to the challenged statutes seeking declaratory and injunctive relief. Therefore, the Court should decline jurisdiction over this case.

3. This Action Is Not Ripe Even Under the Relaxed Standards Applied to Alleged Infringement of the First Amendment

CEC alleges the challenged statutes "abut sensitive areas of basic First Amendment freedoms and in their operation inhibit the exercise of those freedoms." (Compl. ¶ 31). The Ninth Circuit has acknowledged that "[p]articularly in the First Amendment-protected speech context, the Supreme Court has dispensed with rigid standing requirements." *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003). A court may employ "this somewhat relaxed approach to justiciability, however, only upon a showing that the plaintiff 'is immediately in danger of sustaining[] a direct injury as a result of [an executive or legislative] action.'" *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 851 (9th Cir. 2007) (quoting *Laird v. Tatum*, 408 U.S. 1, 12-13 (1972)) (alterations in original). The Ninth Circuit has reiterated that the "potential plaintiff must have 'an actual and well-founded fear that the law will be enforced against [him or her]." *Getman*, 328 F.3d at 1095 (alterations in original). Any "fear of prosecution will only inure if the plaintiff's intended speech arguably falls within the statute's reach." *Id.* There must exist "a credible threat that the challenged provision will be invoked against the plaintiff." *Id.* (citing references and quotations omitted). None exists here.

Further, the "relaxed approach" should not be applied here because it is not at all clear how several of CEC's claims actually implicate the First Amendment. For example, CEC alleges that its members "will be in criminal violation of the Penal Code if they physically or forcefully interfere with, or threaten to interfere with, any student or employee seeking access to facilities traditionally reserved to the opposite sex, whether by intimidation, oppression, or threat of suspension." (Compl. ¶ 26.) First, it is difficult to discern how the use of physical force this hypothetical scenario raises is covered under the First Amendment. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984) (stating "[a]lthough it is common to place the burden upon the Government to justify impingements on First Amendment interests, it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies."). Second, to the extent CEC's factual allegations entail a threat to a person that also violates the Penal Code, this activity is not protected by the First Amendment. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992) ("threats of violence are outside the First Amendment").

CEC also focuses on Education Code § 51500 and alleges that "any curriculum or instruction that pre-assumes the existence of a mother and father in a family relationship might be construed to promote a discriminatory bias against persons choosing alternative relationships. A violation of this provision could cause educators to be disciplined by their employers or cause educators to be guilty of discrimination." (Compl. ¶ 22). The string of hypothetical events CEC envisions highlights the point that "a case is not ripe where the existence of the dispute itself hangs on future contingencies that may or may not occur." *Clinton v. Acequia, Inc.*, 94 F.3d 568, 572 (9th Cir. 1996). Moreover, this speech does not "arguably fall[] within the statute's reach" as required by *Getman* because, standing alone, the instruction envisioned by CEC does not promote a discriminatory bias against any person because of a protected characteristic. Again, though the State Defendants do not believe CEC advances a correct or reasonable interpretation of this section, no state court has interpreted the law.

C. The Complaint Fails to State a Claim Against the Governor, the Attorney General, and, in part, the State Superintendent Because of Eleventh Amendment Immunity

The Eleventh Amendment[4/] bars suit against a state or its instrumentalities for legal or equitable relief in the absence of consent by the state or an abrogation of that immunity by Congress. *Papasan v. Allain*, 478 U.S. 265, 276-77 (1986); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). Section 1983 does not abrogate a state's Eleventh Amendment immunity. *Quern v. Jordan*, 440 U.S. 332, 341 (1979). Nor has the State of California waived that immunity with respect to claims brought under section 1983 in federal court. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985).

"The Eleventh Amendment [also] bars a suit against state officials when 'the state is the real, substantial party in interest.'" *Pennhurst*, 465 U.S. at 101 (citations omitted); *see Almond Hill Sch. v. U.S. Dept. of Agric.*, 768 F.2d 1030, 1033 (9th Cir. 1985). The "general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Pennhurst*, 465 U.S. at 101 (citation omitted). "[A]s when the State itself is named as the defendant, a suit against state officials that is in fact a suit against a

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4. The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

State is barred regardless of whether it seeks damages or injunctive relief." *Id.* at 101-02 (citations omitted).

The Supreme Court recognized an exception to Eleventh Amendment immunity in *Ex parte Young*, 209 U.S. 123 (1908). The *Ex parte Young* exception allows "suits for prospective declaratory and injunctive relief against state officers, sued in their official capacities, to enjoin an alleged ongoing violation of federal law." *Wilbur v. Locke*, 423 F.3d 1101, 1111 (9th Cir. 2005) (quoting *Agua Caliente Band of Cahuilla Indians v. Hardin,* 223 F.3d 1041, 1045 (9th Cir. 2000)). Additionally, however, for the *Ex parte Young* exception to apply "it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party." *Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir. 1998) (quoting *Ex parte Young*, 209 U.S. at 157). "This connection must be fairly direct; *a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit*." *L.A. County Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992) (citing *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992) (emphasis supplied); *L.A. Branch NAACP v. L.A. Unified Sch. Dist.*, 714 F.2d 946, 953 (9th Cir. 1983).

1. The Attorney General Is Immune From Suit Because of the Eleventh Amendment

Here, CEC's allegations indicate that the Attorney General is a named defendant merely as a result of his general law enforcement duties as a state constitutional officer. *See* Cal. Const., art. V, § 13 (stating the Attorney General is "to see that the laws of the State are uniformly and adequately enforced.") But a close reading of the complaint reveals no specific allegations whatsoever regarding the Attorney General.

At most, the Complaint alleges that "[d]efendant EDMUND G. BROWN, JR., as Attorney General, is responsible to prosecute and enforce the laws of California, including Senate Bill 777 and California's prohibition of discrimination against persons on the basis of 'gender' as defined by California law." (Compl. ¶ 11.) Nothing more than this general allegation is set forth in the Complaint. Accordingly, this action as against the Attorney General in his official capacity and as a representative of the State of California is the equivalent of an action against the State itself. Such actions are barred by the Eleventh Amendment.

Dismissing the Attorney General on Eleventh Amendment grounds is firmly supported by Ninth Circuit authority, particularly the case of *Long v. Van de Kamp*. *Long* arose from warrantless surprise searches of a motorcycle repair shop by deputy sheriffs and members of the California Highway Patrol pursuant to a provision in the California Vehicle Code that authorized such searches. *Long v. Van de Kamp*, 772 F. Supp. 1141, 1142 (C.D. Cal. 1991).[5] One of the operators of the repair shop was arrested in connection with a search. *Long*, 772 F. Supp. at 1142-43. The operators filed suit challenging the constitutionality of the Vehicle Code provision. *Id.* at 1143. The operators named the Attorney General and sought to enjoin the Attorney General from enforcing the statute. *Id.* The defendants also included the County of Los Angeles and the individual officers who carried out the searches. *Id.*

In directing the district court to dismiss the Attorney General on Eleventh Amendment grounds, the Ninth Circuit stated that "there must be a connection between the official sued and enforcement of the allegedly unconstitutional statute, and there must be a threat of enforcement." *Long*, 961 F.2d at 152. The Ninth Circuit found that the "general supervisory powers of the California Attorney General" did not establish the connection with enforcement required by *Ex parte Young*. *Id.* (citing *S. Pac. Transp. Co. v. Brown*, 651 F.2d 613, 614 (9th Cir. 1981) (as amended).[6] There also was no threat that the Vehicle Code provision would be enforced by the Attorney General, who "ha[d] not in any way indicated that he intend[ed] to enforce [the provision]." *Id.* "In addition, the searches of plaintiffs' premises were not the result of any

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5. While the court of appeals vacated the trial court's order in *Long*, the Ninth Circuit's published decision incorporates by reference the facts of the case as set forth in the district court's opinion. *See Long*, 961 F.2d at 152.

6. In *Southern Pacific Transportation Co.*, several railroads sued the Oregon Attorney General to enjoin enforcement of a statute limiting employers' abilities to negotiate settlements with employees injured on the job. 651 F.2d at 614. The Ninth Circuit held that "[t]he attorney general's power to direct and advise [district attorneys] does not make the alleged injury fairly traceable to his action, nor does it establish sufficient connection with enforcement to satisfy *Ex parte Young*." *S. Pac. Transp. Co.*, 951 F.2d at 615.

action attributable or traceable to the Attorney General." *Id.* Accordingly, the Ninth Circuit held that "[a]bsent a *real likelihood* that the state official will employ his supervisory powers against plaintiffs' interests, the Eleventh Amendment bars federal court jurisdiction." *Id.* (emphasis added).

The circumstances here are remarkably similar to those in *Long*. Here, there is no "real likelihood" or threat of enforcement from the Attorney General against CEC. CEC identifies no instance when the Attorney General enforced, or threatened to enforce, the eight challenged statutes against CEC. The "general supervisory powers of the Attorney General" are simply insufficient to establish the mandatory direct connection with enforcement of the specified statutes. Accordingly, the *Ex parte Young* exception does not apply in this case. *See Long*, 961 F.2d at 152; *see also Snoeck,* 153 F.3d at 987 ("As *Ex parte Young* explains, the officers of the state must be cloaked with a duty to enforce the laws of the state and must threaten or be about to commence civil or criminal proceedings to enforce an unconstitutional act."). The Court should dismiss the Attorney General because the Complaint fails to state a claim against him.

2. The Governor is Immune From Suit Because of the Eleventh Amendment

This same analysis warrants dismissal of the Governor. CEC names the Governor as a defendant because he "signed the Senate Bill 777 into law and is responsible to uphold and enforce the laws of California, including Senate Bill 777 and California's prohibition of discrimination against persons on the basis of 'gender' as defined in California law." (Compl. ¶ 10.) None of these allegations establish the requisite direct connection with enforcement of the statute that is required for the *Ex Parte Young* exception to apply.

The California Constitution requires the "Governor shall see that the law is faithfully executed." *See* Cal. Const., art. V, § 1. The Governor's general duties to enforce the law are insufficient to establish the required connection here with enforcement of the challenged provisions of the Penal and Education Codes. *See Los Angeles Branch NAACP v. Los Angeles Unif. Sch. Dist.*, 714 F.2d 946, 953 (9th Cir. 1983). Similar to the Attorney General, CEC has

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identified no instance where the Governor has enforced, or threatened to enforce, the eight challenged statutes against CEC.

Furthermore, to the extent that the Governor is named because he signed SB 777 into law, this is not a basis to overcome Eleventh Amendment immunity. Adopting this as a standard would mean that the Governor is a proper defendant whenever challenging any statute signed into law by the executive, regardless of whether the Governor has any direct connection to its enforcement. There is no basis for such an unwarranted extension of the law.

The case of *National Audubon Society, Inc. v. Davis*, 307 F.3d 835 (9th Cir. 2002) also supports the dismissal of the Governor. In *National Audubon Society*, the Ninth Circuit considered a challenge to provisions of the California Fish and Game Code, enacted when California voters passed Proposition 4.[7] *Id.* at 843. In its analysis, the Ninth Circuit considered whether defendants the Governor and the Secretary of Resources of the State of California "ha[d] direct authority and practical ability to enforce the challenged statute[.]" *Id.* at 846. The court held that suit seeking injunctive and declaratory relief was "barred against the Governor and the state Secretary of Resources, as there is no showing that they have the requisite enforcement connection to Proposition 4." *Id.* at 847. In contrast, the court permitted the suit to go forward as to the Director of the California Department of Fish and Game, "who has direct authority over and principal responsibility for enforcing Proposition 4." *Id.*

The Governor does not have the "requisite enforcement connection" to the Education and Penal Codes challenged by CEC. Accordingly, the *Ex parte Young* exception does not apply. This suit as against the Governor is barred by the Eleventh Amendment.

3. The State Superintendent of Public Education is Immune From Suit Challenging the Penal Code Because of the Eleventh Amendment

This analysis also mandates dismissal of the State Superintendent of Education insofar as CEC names the Superintendent in its challenge to the Penal Code sections. CEC names the

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7. The provisions banned the use of certain poisons and traps to capture wildlife and authorized criminal prosecutions. *Nat'l Audubon Soc'y*, 307 F.3d at 842-43. At the time that lawsuit was initiated, one trapper had already been arrested and prosecuted for violation of the law. *Id.* at 843.

Superintendent because he "is responsible to enforce the education laws of California, including Senate Bill 777 and California's prohibition of discrimination against persons on the basis of 'gender' as defined in California law." (Compl. ¶ 12.) The Superintendent has no connection, direct or otherwise, to the enforcement of the Penal Code.

The Superintendent is the secretary and executive officer of the California Board of Education. Cal. Ed. Code, § 33004. CEC does not contend that the Superintendent has the "requisite enforcement connection" with respect to the State's Penal Code. Accordingly, the *Ex parte Young* exception does not apply insofar as CEC brings this challenge to the Penal Code against the Superintendent.

D. CEC's Second Cause of Action Is Barred Under the Eleventh Amendment and *Penhurst St. Sch. & Hosp. v Halderman*

CEC's prayer requests "this Court issue Preliminary and Permanent Injunctions enjoining Defendants, Defendants' agents and employees, and all persons in active concert or participation with them from enforcing the laws set forth in the first cause of action." (Compl. p.10, ln. 21-23.) CEC also prays "this Court render a Declaratory Judgment declaring that the laws set forth in the second cause of action violate the California Constitution Article 1, Section 1." (*Id.* at p. 10, ln. 27-28). CEC's claims for injunctive and declaratory relief are barred to the extent they request this Court to grant injunctive and declaratory relief on the basis that the challenged state statutes violate state law.

In *Pennhurst State Sch. & Hosp. v. Halderman*, Justice Powell for the majority wrote "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." 465 U.S. 89, 106 (1984). The Court ruled "a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment." *Id.* at 121. The Court then held "that this principle applies as well to state-law claims brought into federal court under pendent jurisdiction." *Id.* This principle has been applied by lower courts to claims for both injunctive and declaratory relief. *Actmedia, Inc. v. Stroh*, 830 F.2d 957, 962 (9th Cir. 1986) ("conclud[ing] that the eleventh amendment prohibits this court and prohibited the district court from addressing any of [plaintiffs] claims against [the state defendant], and from addressing [plaintiffs'] state statutory and state constitutional claims against [the state defendant].").

The Second Cause of Action requests this Court declare the challenged statutes unconstitutional on the basis that they violate article I, section 1 of the California Constitution and issue injunctive relief barring the State Defendants from future enforcement. CEC's Complaint names the State Defendants in their official capacities and does not allege that the State Defendants acted in anything other than an official capacity. The injunctive and declaratory relief requested by CEC on the asserted basis that the challenged statutes violate the State Constitution is barred by the Eleventh Amendment and *Penhurst*. Accordingly, the Second Cause of Action must be dismissed.

E. The Court Should Decline to Exercise Supplemental Jurisdiction Over CEC's Second Cause of Action Because It Presents a Novel Issue of State Law

If the Second Cause of Action is not dismissed in its entirety, the Court should decline to exercise supplemental jurisdiction over CEC's Second Cause of Action. The Second Cause of Action alleges that California Education Code §§ 210.7, 212.6, 220, 51500, and California Penal Code §§ 422.55(a)(2) and (6), 422.55(b), 422.56(c), and 422.6(a) violate the California Constitution because they "are in contravention to the rights of safety and privacy and amount to serious invasion of those interests." (Compl. ¶ 36. (citing Cal. Const. art. I., § 1).) CEC invokes this Court's supplemental jurisdiction over this claim pursuant to 28 U.S.C. § 1367.

Supplemental, or pendent, jurisdiction has been recognized by the Supreme Court as "a doctrine of discretion, not of plaintiff's right." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966). The federal court has "broad discretion" in evaluating whether to exercise supplemental jurisdiction over state law claims. *Moor v. Alameda County*, 411 U.S. 693, 716 (1973); *Medrano v. City of Los Angeles*, 973 F.2d 1499, 1506 (9th Cir. 1992).

Pursuant to federal law, a court may decline to exercise supplemental jurisdiction over a state claim if "the claim raises a novel or complex issue of State law." 28 U.S.C. § 1367, subd. (c)(1). The Ninth Circuit has observed that "the difficult question of [state] constitutional law presented is the very sort of 'novel' issue that usually will justify declining jurisdiction over the claim." *O'Connor v. State of Nevada*, 27 F.3d 357, 363 (9th Cir. 1994) (citing 28 U.S.C. § 1367(c)(1)).

In this case, CEC's claims of facial unconstitutionally of these omnibus statutes raise novel issues of state law as contemplated by § 1367(c)(1). CEC requests this Court to declare eight sections of the California Education and Penal Codes facially unconstitutional on the basis that they violate article 1, Section 1 of the California Constitution. Many of these code sections have not been given a controlling interpretation by the California courts, which thereby requires this Court to interpret several code sections as an initial matter, and then conclude that they violate the California Constitution.

For example, CEC "facially challenges the redefinition of the term 'gender' as it will be impossible for school administrators and educators to enforce this new definition." Compl. ¶ 1.) Aside from the fact that SB 777 did not redefine the term "gender" as CEC contends, this challenge raises novel issues of state law regarding the term "gender" and the interplay between the Education and Penal Codes.

A plaintiff in CEC's position "cannot complain if ancillary jurisdiction does not encompass all of his possible claims in a case such as this one, since it is he who has chosen the federal rather than the state forum and must thus accept its limitations." *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978). A challenge to eight separate state statutes on state constitutional grounds should be brought in a California court in the first instance. Accordingly, the Court must decline to exercise supplemental jurisdiction over CEC's Second Cause of Action.

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V.

CONCLUSION

For these reasons, the State Defendants respectfully request the Court grant the Motion and dismiss this action in its entirety.

Dated: January 11, 2008

Respectfully submitted,

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